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No. 02-682

IN THE

Supreme Court of the United States

VERIZON COMMUNICATIONS, INC.,
Petitioner,

v.

LAW OFFICES OF CURTIS V. TRINKO, LLP,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF OF AT&T CORP., CAVALIER TELEPHONE, AND COMPETITIVE TELECOMMUNICATIONS ASSOCIATION AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

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INTERESTS OF *AMICI CURIAE*[1]

AT&T Corp. ("AT&T"), Cavalier Telephone, L.L.C. ("Cavalier"), and the Competitive Telecommunications Association ("CompTel") each has an acute interest in the question of how the antitrust laws apply to conduct that is also subject to the Telecommunications Act of 1996. *Amici* are also uniquely situated to provide information relevant to the resolution of this case and the issues that it raises.

In addition to providing long distance services, AT&T provides local telephone service throughout the United States by leasing combinations of all elements of incumbent local exchange carrier networks, by combining leased local loops with switches and other facilities that AT&T provides, or through other arrangements. Respondent's claims in this case are derivative of injuries that are alleged to have been suffered by AT&T.

Cavalier provides local services in seven markets in the mid-Atlantic and southeastern United States by obtaining unbundled loops and combining them with Cavalier's switching, transport, and other facilities. Cavalier has brought an antitrust action that makes explicit allegations of myriad ways in which Verizon has maintained local monopolies by denying access to essential facilities. *Cavalier Tel., LLC* v. *Verizon Va., Inc.*, 330 F.3d 176 (4th Cir. 2003), *amended* 2003 WL 21299893 (4th Cir. June 6, 2003) (petition for certiorari to be filed on August 18, 2003) ("*Cavalier*").

Finally, CompTel is the oldest and largest industry trade association representing competitive telecommunications providers.

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[1] No counsel for a party has written this brief in whole or in part and no person or entity, other than *amici* or their counsel, has made a monetary contribution to the preparation or submission of this brief. Counsel for petitioner and respondent have consented to the filing of this brief.

INTRODUCTION AND BACKGROUND

Although this case presents a threshold issue of consumer standing, the United States and Federal Trade Commission (collectively "DOJ") and petitioner Verizon have seized upon the case to advance an extraordinary claim. They ask the Court to repudiate antitrust principles that were previously urged by the Ford, Carter, Reagan, and Clinton Administrations; that have been adopted by six federal courts of appeals; that were the basis for the landmark Decree that broke up the Bell System; and that have been endorsed by the nation's leading antitrust scholars (Phillip Areeda, Robert Bork, and Lawrence Sullivan), both in their writing and in congressional testimony in the proceedings that led to the Telecommunications Act of 1996 ("1996 Act").

Respondent's Complaint alleges that Verizon has maintained its local telephone monopolies by willfully violating FCC regulations that require incumbents to provide would-be rivals with access to essential "inputs" into local telephone services at rates that are compensatory, but that deny the incumbents the supracompetitive returns that they could earn by providing the "downstream" local services themselves. The regulations in question are modeled on those that the FCC previously adopted to open long distance and equipment markets to competition. The earlier FCC regulations (like the new ones) provided incumbents with economic incentives to delay or deny the required access in order to maximize profits in the short (as well as long) term.

In this indistinguishable context, the prior administrations argued, and courts of appeals uniformly held, that conduct that maintained monopolies by willfully violating these access regulations constitutes monopolization under § 2 of the Sherman Act. In particular, rather than legitimizing the defendant's conduct, the fact that the incumbents had incentives to violate access regulations designed to foster competition and produce lower prices for consumers was there treated as establishing that the conduct served no

legitimate business purpose and as *increasing* the need for antitrust enforcement.

In this case, DOJ and Verizon urge the opposite rule. They assert that the fact that an incumbent's conduct evaded access regulations in order to maximize its short-run profits conclusively establishes the legitimacy of the conduct. In this regard, DOJ acknowledges, as it must, that the general rule is that conduct that maintains a monopoly by willfully violating procompetitive duties "extrinsic" to the antitrust laws has no "legitimate business purpose" and constitutes willful exclusionary conduct that will support a monopolization claim. But DOJ and Verizon claim that the antitrust *savings* clause of the 1996 Act – which provides that nothing therein shall be construed to affect the "applicability" of the antitrust laws – requires that antitrust cases be decided as if the 1996 Act had never been passed. As demonstrated below, that view cannot be reconciled with antitrust laws or the terms, history, or purposes of the savings clause. DOJ and Verizon also advance new antitrust theories that have no support in case law and that would create antitrust immunity for the conduct that presents the clearest violation of the objects of the antitrust laws.

Moreover, this is a singularly inappropriate case in which to consider limiting accepted antitrust principles. The case was brought by a consumer, which is asserting injuries that are derivative of harms suffered by AT&T and which has no knowledge of any of the details of the relationships between incumbent local exchange carriers and competitive carriers. Further, while the Complaint asserts that AT&T provides respondent's service by leasing local loops and other unbundled network elements under the 1996 Act, that is incorrect.[2] Resolution of the question of the relationship of

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[2] AT&T provides local and other services to respondent through AT&T switches that are connected to respondent's premises over Verizon

the antitrust laws and the 1996 Act will have no effect on the ultimate disposition of this case. Thus, unless the case is resolved for lack of standing, the Court should consider dismissing the writ in this case and addressing the issues in *Cavalier* or another pending case that squarely raises these antitrust issues.

1. Prior to the late 1960s, all telecommunications services and equipment in the United States were provided by the monopolies that were franchised by state utility commissions to serve designated geographic areas and that are now known as "incumbent local exchange carriers" or "ILECs." The Bell Operating Companies ("BOCs") – which were then owned by AT&T – collectively provided telephone service and equipment to more than 80% of the nation's customers. The remainder of the country was served by some 1400 "independent" (*i.e.*, non-Bell) ILECs.

The ILECs then provided end-to-end local and long distance service that included telephone instruments and any attachments to them ("customer premises equipment" or "CPE"). Further, long distance service was a monopoly that was jointly offered by a "partnership" of all the ILECs and the Long Lines Department of AT&T.[3]

In the late 1960s, the FCC attempted to introduce competition into long distance services and the provision of

facilities that it provides by tariff under §§ 201-205 of the Communications Act, 47 U.S.C. §§ 201-205.

[3] In particular, all the ILECs were interconnected to one another either directly or through interstate facilities owned by AT&T Long Lines, and long distance service was a joint offering (managed by AT&T Long Lines) in which each company was responsible for the transmission facilities within its territories and in which revenues were divided in proportion to each company's share of the national network.

CPE.[4] The FCC adopted regulations that required ILECs to reconfigure their end-to-end services so that CPE and long distance service were unbundled from local service – such that customers could obtain local services from the incumbent and obtain long distance service or CPE from competitors. Because new entrants could not offer competing services unless they or their customers could access the ILECs' local loops and other facilities on reasonable terms, the FCC further adopted interconnection regulations that were designed to confer these wholesale access rights.

Contrary to Verizon's revisionist claims (Br. 41-43), the FCC regulations in each case required incumbents to establish something "brand new." Incumbents were *not* voluntarily offering these access arrangements to any customers at the same rates and terms.

First, in the case of telephone equipment, the ILECs' tariffs had required that they provide not only telephone instruments (and office telephone systems), but also any equipment that was acoustically or inductively attached to telephone instruments. In 1968, the FCC invalidated these tariffs and directed ILECs to submit new tariffs that would protect the network from harm and that may specify technical standards for interconnected equipment. *Carterfone*, 13 F.C.C.2d 420, 426 (1968); see *Phonetele, Inc.* v. *AT&T Co.*, 664 F.2d 716, 724 (9th Cir. 1981) (Kennedy, J.).

The incumbents responded by filing tariffs that allowed acoustical or inductive connections of equipment that ILECs did not install, but prohibited electrical connections of any equipment performing network control signaling on the ground that that would harm the network. Customers had to either (1) obtain incumbents' telephone instruments and systems (which had built-in network control signaling units)

[4] *See Carterfone*, 13 F.C.C.2d 420 (1968); *Microwave Communications*, 18 F.C.C.2d 953 (1969); *Specialized Common Carriers*, 29 F.C.C.2d 870 (1971), *aff'd*, 513 F.2d 1142 (9th Cir. 1975).

or (2) if they obtained the equipment from third parties, connect it through expensive equipment (called "protective connecting arrangements" or "PCAs") that provided the signaling and that incumbents supplied. See *id.* at 725-26.

Over the next seven years, incumbents maintained this PCA requirement and opposed its elimination before the FCC on the ground that it was necessary to protect the network from harm. In 1975, the FCC found that these PCA restrictions were unnecessary and invalidated them. One antitrust court found that the ILECs' imposition of the PCA requirement was unlawful and their advocacy of its retention before the FCC was sham litigation that had unlawfully maintained their CPE monopoly. *Litton Sys., Inc.* v. *AT&T Co.*, 700 F.2d 785, 809-12 (2d Cir. 1983). Antitrust liability was thus imposed based on the incumbents' failure to offer "never-before-offered terms:" telephone service without ILEC-provided network control signaling devices. Compare Verizon Br. 19.

Similarly, the FCC regulations sought to open long distance markets to competition by authorizing MCI and other "specialized common carriers" to construct intercity transmission facilities and to interconnect with the ILECs' local distribution facilities on the two ends of each long distance call. Here, too, the FCC regulations required incumbents to offer something "brand new" (now called "exchange access" services) at regulated rates that did not recover the margins ILECs earned on their own retail services.[5] Here, too, the same rates, terms and conditions were not voluntarily provided to any other customer.[6] It was

[5] For switched services, the rates paid by the specialized carriers represented discounts of 55% off the revenues that ILECs received for use of their local exchange facilities under the division of revenue contracts that ILECs had with AT&T Long Lines. *Exchange Network Facilities for Interstate Access (ENFIA)*, 71 F.C.C.2d 440 (1979).

[6] Verizon is misstating the facts in asserting (Br. 13, 42) that ILECs provided "the same services" at the same rates and terms to Western Union, to end user customers, or to independent telephone customers. First, the MCI jury rejected the claim that AT&T had discriminated in favor of Western Union and against MCI. *MCI Communications Corp.* v. *AT&T Co.*, 708 F.2d 1081, 1208 (7th Cir. 1983) (Interrogatory Answer 5(d)). Second, Verizon notes that MCI had sought to support a tying claim by "*argu[ing]* that AT&T had sold these interconnections as a separate product to local customers, independent telephone companies and others for years," but the Court of Appeals did not accept this tying claim. *Id.* at 1144 (emphasis added). Third, Verizon relies (Br. 42) on out-of-context quotations of language from an FCC Order. But that order made it explicit that AT&T Long Lines and independent telephone companies used their local distribution facilities as part of end-to-end services in which they were "partners in the joint provision of interstate [long distance] services," that the facilities had not been separately offered to any third party, and that the FCC had ordered new wholesale arrangements in order to allow long distance competition. *Bell Sys. Tariff Offerings*, 46 F.C.C.2d 413, 426-430 (1974).

precisely because incumbents were not voluntarily providing this access service to other customers that the FCC conducted several multi-year proceedings to determine the rates, terms, and conditions that should apply to this new wholesale "exchange access" service that ILECs provide to long distance carriers.[7]

The incumbents also violated the FCC's access regulations. For example, they delayed MCI's entry into long distance markets by denying it local distribution facilities for use in providing certain long distance services (*e.g.*, Foreign Exchange and Common Channel Signaling) on the ground that these services had not been authorized by the FCC. This conduct, and several other acts that impaired MCI's access to local distribution facilities, were later found to be bad faith violations or evasions of FCC access regulations that constituted unlawful monopolization. See *MCI*

[7] *See, e.g., Offer of Facilities for Use by Other Common Carriers*, 52 F.C.C.2d 727 (1975); *Exchange Network Facilities for Interstate Access (ENFIA)*, 71 F.C.C.2d 440 (1979); *Exchange Network Facilities for Interstate Access (ENFIA)*, 90 F.C.C.2d 6 (1982).

Communications Corp. v. *AT&T Co.*, 708 F.2d 1081, 1132-33 (7th Cir. 1983).

2. This same conduct was subsequently challenged in more than 70 private antitrust actions and in a DOJ lawsuit that sought to break up the Bell System. In each of these suits, the central allegation was that BOCs had violated the antitrust laws by denying competitors reasonable access to essential facilities, and that the conduct had no legitimate business purpose because it violated the FCC's access regulations.

For example, rather than meet the pleading and proof standards that DOJ would have the Court apply in this case, DOJ's complaint simply asserted that the Bell System's denials of access to long distance providers and equipment manufacturers had anticompetitive effects. See *United States* v. *AT&T*, Complaint, Civ. No. 74-1698 (D.D.C. filed Nov. 20, 1974). DOJ relied on "one central point": "that because the Bell System . . . possesses a monopoly in the distribution of local telecommunications services, meaningful competition in the provision of inter city [long distance] services is precluded unless the non-Bell carriers are able to obtain interconnection with the Bell local distribution facilities under non-discriminatory terms and conditions." *United States* v. *AT&T*, 524 F. Supp. 1336, 1352 (D.D.C. 1981).

The Bell System moved to dismiss each of the foregoing cases on the grounds that the FCC's regulations had created the competitive opportunities in equipment and long distance markets and that the lawfulness of the Bell System's conduct was pervasively regulated and should be governed exclusively by the Communications Act and state regulations. Courts uniformly rejected all those "implied immunity" and "state action" arguments.

As the *MCI* court stated, "the interconnection policies adopted by the FCC during the time period relevant to this litigation appear designed to promote rather than inhibit competition in the specialized telecommunications field.

Thus, the allowance of antitrust liability is likely to complement rather than undermine the applicable statutory scheme." 708 F.2d at 1104. As then Judge Kennedy stated, the fact the challenged conduct had been later held to violate FCC regulations meant that "applying the antitrust laws . . . involves no conflict between pro-competitive antitrust policies and agency policies" and when conduct also violates antitrust standards, Congress intended that antitrust remedies (treble damages) would "supplement" the more limited remedies available under the Communications Act. *Phonetele*, 664 F.2d at 733-35. *Accord Essential Communications Sys., Inc.* v. *AT&T Co.*, 610 F.2d 1114, 1117 (3d Cir. 1979); *Southern Pac. Communications Co.* v. *AT&T Co.*, 740 F.2d 980, 994, 999-1000 (D.C. Cir. 1984); *Litton*, 700 F.2d at 807; *Mid-Texas Communications Sys., Inc.* v. *AT&T Co.*, 615 F.2d 1372, 1377-82 (5th Cir. 1980).

At the same time, because courts recognized that FCC access regulations were often unambiguous, they held that antitrust liability should not be imposed if incumbents actually had objectively reasonable good faith beliefs that their conduct satisfied the FCC's regulations. *Southern Pac.*, 740 F.2d at 1009-11; *Phonetele*, 664 F.2d at 737-38; *MCI*, 708 F.2d at 1138; *Mid-Texas*, 615 F.2d at 1380. Under the uniform courts of appeals' holdings, antitrust liability could be imposed only if there were a bad faith or willful violation of the access requirements.

While nearly all of the 70 private antitrust actions were settled, in several cases juries found antitrust liability and substantial treble damages judgments were entered. See *MCI*, 708 F.2d at 1092; *Litton*, 700 F.2d at 789.

3. These cases resulted in the compilation of records that demonstrated that antitrust enforcement is an essential complement to the FCC's efforts to foster competition through access regulations. The evidence was that complexity of local exchanges gave the incumbents the "ability" to evade whatever regulations were adopted. It

further showed that the rate regulation of the local facilities gave the incumbents overwhelming and irresistible "incentive[s]" to commit these evasions because that would maximize their profits in the short run (as well as in the long run). *United States* v. *AT&T*, Competitive Impact Statement, 47 Fed. Reg. 7170, 7171-74 (1982).

First, the evidence in *United States* v. *AT&T*, 524 F. Supp. 1336, 1352-53 (D.D.C. 1981), was that BOCs had the ability to evade any access regulations. In particular, due to the complexity and dynamic nature of local exchanges, FCC and state regulations that defined rights of access to exchanges could never foresee and proscribe in advance all the forms of possible anticompetitive conduct. BOCs could always seize upon real or contrived ambiguities in regulations – or claims of technical infeasibility – to justify delaying or denying a necessary access arrangement. Further, they could frustrate the implementation of the access arrangements that they did provide in subtle ways that regulators often could not detect. Even if a specific exclusionary practice were identified and prohibited, BOCs could "shift from one anticompetitive activity to another." *United States* v. *AT&T*, 552 F. Supp. 131, 167 (D.D.C. 1982), *aff'd*, 460 U.S. 1001 (1983).

Second, DOJ's evidence showed that the rate regulation of the local loops and other monopoly access facilities meant BOCs had irresistible incentives to engage in this conduct in order to obtain monopoly returns in the less regulated or unregulated long distance or equipment markets. DOJ's evidence was that regulatory remedies were palpably insufficient to deter this conduct, and given the formidable difficulties of proof, even the threat of treble damages under the antitrust laws could be insufficient.

DOJ contended that the only remedy that could prevent recurrence of the challenged conduct was structural separation of the BOCs' local exchange monopolies from competitive long distance and equipment businesses. *Id.* at 139-44. In order to eliminate the threat of antitrust lawsuits

and judgments, AT&T, on behalf of the Bell System, stipulated to an antitrust decree (the MFJ) that granted the relief that DOJ had sought. The MFJ (1) required that the Bell System be split between its local operations (assigned to the BOCs) and its long distance and equipment operations (assigned to AT&T) and (2) barred the BOCs from providing long distance service for so long as they had local monopolies. *Id.* at 160-70, 186-89. However, the MFJ did nothing to eliminate local exchange monopolies.

The MFJ proved to be one of the most successful remedies in antitrust history and led to the development of intensely competitive long distance and CPE markets.

4. Beginning in the late 1980s, the BOCs sought legislative repeal of the MFJ's line of business restrictions. This legislation was opposed by AT&T (and many others).

AT&T submitted to Congress written opinion letters from the nation's three leading antitrust scholars – Robert Bork, Phillip Areeda, and Lawrence Sullivan.[8] Judge Bork and Professor Areeda stated that while vertical integration is ordinarily benign and generally should not be restricted under the antitrust laws, an entirely different calculus applies when a firm controls rate-regulated monopoly local facilities that are essential inputs into long distance services or other downstream markets that are unregulated or less regulated.[9] In this context, they explained that because the incumbent monopolist will seek to maximize its profits, it will have powerful incentives to deny competitors access to natural

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[8] *See Hearing Before the Subcomm. on Econ. & Commercial Law, House Comm. on the Judiciary*, pt. 2, 102d Cong. 40 (1992) (referencing legal opinions attached to Statement of Robert E. Allen, CEO, AT&T Corp.; hereinafter "Areeda Op.," "Bork Op.," and "Sullivan Op.," *available at* www.pulver.com/documents/AreedaOpinion1.pdf; www.pulver.com/documents/BorkOpinion1.pdf; and www.pulver.com/documents/ SullivanOpinion.pdf).

[9] *See* Areeda Op. 8-11; Bork Op. 3-4.

monopoly inputs in order to evade the rate regulations and to continue to earn supracompetitive profits in the retail downstream market.[10] Each of these antitrust experts stated that such conduct would violate the antitrust laws.[11] Each also agreed that regulation is incapable of identifying in advance and preventing each form of misconduct that can occur.[12]

5. In the 1996 Act, Congress adopted a new chapter of the Communications Act (47 U.S.C. §§ 251-261) that is designed to open local telephone markets to competition as quickly as possible and to drive rates for local exchange and exchange access services towards competitive levels.[13]

In addition to offering "resale" rights (*id.* § 251(c)(4)), the Act authorizes any requesting carrier to access loops, switches, transport, or other unbundled "elements" of the incumbent's network at cost-based rates and to use them to offer any telecommunications service. *Id.* § 251(c)(3). Under this provision, new entrant competitive carriers ("CLECs") can offer service by leasing combinations of loops, transport and switching, and providing other necessary facilities, retail functions, or value-added services themselves – which Verizon (Br. 6 n.7) falsely asserts to be the equivalent of "resale." CLECs also have the right to lease just the local loops and offer service by connecting those loops with switching facilities that the CLEC itself provides, which Verizon acknowledges to be facilities-based competition.

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[10] *See* Areeda Op. 2-5, 38-39; Bork Op. 4-7.

[11] *See* Areeda Op. 64-65; Bork Op. 7-14.

[12] *See* Areeda Op. 3-4, 11-12; Bork Op. 6-7; *see also* Sullivan Op. 11-13.

[13] Although the 1996 Act vacated the MFJ (47 U.S.C. § 152 note), Congress simultaneously codified the MFJ's long distance services restriction until such time as measures designed to open local services to competition were fully implemented (*id.* § 271).

Further, when carriers establish complete networks of their own loops, switching, and transport, they have the right to "interconnect" their networks with the incumbent's and arrange for exchange of traffic between the two networks. 47 U.S.C. § 251(c)(2).

In implementing the 1996 Act's mandate that network element and interconnection rates be "based on . . . cost," *id.* § 252(d)(1), the FCC adopted the TELRIC pricing standard that entitles ILECs to recover the full economic costs of providing such access, but denies them the supracompetitive returns that they currently earn on the local exchange services provided to retail customers and exchange access services provided to long distance carriers. See *Local Competition Order*, 11 FCC Rcd. 15,499, 15,850-15,860, ¶¶ 690-711 (1996). The Commission did so in order to drive rates for the latter services closer to economic cost and thereby "replicate[] . . . the conditions of a competitive market." *Id.* at 15,846, ¶ 679. Because of the prospects of this competition, regulatory authorities have declined to engage in meaningful regulation of rates for incumbents' exchange and exchange access services. *E.g.*, *Access Charge Reform*, 12 FCC Rcd. 15,982, 16,088-16,089, ¶¶ 249-252 (1997).

6. The ILECs have acted on their economic incentive to delay, frustrate, and often to deny access and interconnection to CLECs. Incumbents have done so through courses of conduct that have featured sham litigation, fraudulent misrepresentations, acts of sabotage, and outright denials of access to particular facilities, as well as refusals to provide facilities on the terms required by regulation.

In this regard, the Complaint in this case lacks relevant information. It was drafted by a customer which inherently lacked information about any of the actual details of the relationships between ILECs and CLECs, and the Complaint is therefore a vague, conclusory, and, in some respects, inaccurate document (*e.g.*, *supra* at 3 n.2). There is no way any *amicus* brief can provide a full picture of the kinds of

conduct that has occurred, and unless the Court is disposed to decide this case on other grounds or summarily to reject the positions advanced by Verizon and DOJ, *amici* urge the Court to dismiss this case as improvidently granted and address the issues in a case that presents an actual record of Verizon's conduct (or at least a detailed set of allegations).

But the experience of *amicus* Cavalier will provide the Court with some sense of the kind of conduct that has occurred. Cavalier (like AT&T and many other members of CompTel) is not a "reseller." Cavalier has installed its own switches and has often linked them together through its own transport facilities. But Cavalier must lease local loops from Verizon to provide service.

Verizon has engaged in a course of bad faith conduct that has prevented Cavalier from effectively competing with the Verizon monopoly. First, after Cavalier's initial network was operational, Verizon refused to interconnect and delayed Verizon's entry for five months on the sham ground – foreclosed by the plain terms of the Act – that Verizon was entitled to deny access until Cavalier first obtained state certificates. *Cavalier Tel., LLC* v. *Verizon Va., Inc.*, Complaint, No. 01-CV-736, ¶ 49 (E.D. Va. filed Nov. 1, 2001). Thereafter, Verizon denied Cavalier access to the types of loops used by 25% of customers by making sham claims – later proven false – that providing access to these loops was technically impossible. *Id.* ¶¶ 92-93.

Verizon further negotiated in bad faith over details of access in individual offices, making fraudulent assertions about unavailability of space, refusing to timely process orders when it became apparent that space was available, and delaying access to particular facilities for periods of up to two years and longer. This is a small fraction of the conduct which is the basis for the antitrust claims that are at issue in *Cavalier*, and that the Fourth Circuit dismissed because it accepted the antitrust theories that DOJ and Verizon are here advancing.

SUMMARY OF ARGUMENT

As DOJ states (Br. 23-24), respondent's complaint is fairly read as alleging that Verizon maintained its local monopoly by willfully violating FCC regulations that required it to provide AT&T and other competitors with access to facilities (local loops) essential to the provision of local exchange service at rates set pursuant to the cost-based "TELRIC" standard. DOJ contends that this allegation should be deemed facially insufficient to state a § 2 claim because (i) TELRIC rates do not afford Verizon the profit margins that it would earn if it used the local loops to provide its own "downstream" retail local exchange and other services, and (ii) the complaint contains no cost or other allegations that, notwithstanding the difference between wholesale and retail profit margins, Verizon's conduct reflected a "sacrifice" of short-term profits (*e.g.*, based on the fact that Verizon's conduct subjected it to the risk and, here, actuality, of substantial fines).

Verizon and DOJ assert two basic reasons why the absence of specific allegations that the access denials were contrary to Verizon's short-term interests should prove fatal to the complaint. First, although they acknowledge the general antitrust principle that violations of such duties "extrinsic" to the antitrust laws constitute willful exclusionary conduct (DOJ Br. 12 n.3), they contend that the 1996 Act's antitrust *savings* clause prohibits the application of this general antitrust standard here. In their view, that provision means that antitrust challenges to conduct subject to the 1996 Act must somehow be decided as if the 1996 Act's duties do not exist.

Second, DOJ and Verizon make arguments about the meaning of "unadorned" antitrust standards that purportedly apply when the regulatory context established by the 1996 Act is ignored. Here, they contend that determinations whether exclusionary conduct constitutes monopolization turn

on whether the conduct violates a "negative" duty (such as refraining from fraudulent claims or sham litigation) or an "affirmative" duty (such as failing to share essential facilities). Because refusals to deal involve "positive" duties, DOJ contends such conduct cannot violate the antitrust laws unless it reflects sacrifice of an incumbent's short-run profits.

Both claims are baseless. The antitrust savings clause merely provides that nothing in the 1996 Act shall be construed to affect the "applicability" of the antitrust laws to conduct subject to the 1996 Act. It operates only to preclude claims that this conduct is impliedly immune from antitrust laws. It does not affect the rule that antitrust standards must be applied in light of the regulations that govern an industry. Indeed, under DOJ's and Verizon's view, the savings clause would destroy itself. It would immunize from liability conduct that would be held to violate the antitrust laws if there were no savings clause.

DOJ and Verizon are wrong in contending that there is a categorical rule that refusals to deal cannot violate the antitrust laws unless they represent short-run sacrifices of monopoly profits (much less that there is no need even to inquire into whether there is such a sacrifice unless the defendant has denied rivals access on the same rates and terms as were voluntarily made available to non-rivals). This Court has upheld judgments condemning refusals to deal that were plainly unaccompanied by such "sacrifices" in *Otter Tail* and *Aspen Skiing*, and no refusal to deal decision has ever adopted the test that DOJ and Verizon propose.

Moreover, the distinctions that DOJ would draw between negative and affirmative duties cannot, particularly in this context, be squared with any rational theory of the antitrust laws. DOJ's approach would depend on arbitrary characterizations of different acts that are part of a single course of conduct and would treat acts that have the same anticompetitive purposes and effects differently depending on whether they were characterized as affirmative or negative.

Further, DOJ's approach would result in the absurdity that access denials that created the greatest harm to competition (denying interconnection to firms with complete alternative local networks) would be the *least* likely to result in antitrust liability.

ARGUMENT

I. THE ALLEGATION THAT VERIZON HAS MAINTAINED ITS MONOPOLY BY VIOLATING FCC ACCESS REGULATIONS STATES A CLAIM FOR MONOPOLIZATION.

DOJ's and Verizon's arguments appear to rest on a simple misconception of the relationship between antitrust standards and regulatory requirements. For example, DOJ appears to believe that if *some* conduct that violates the 1996 Act also violates the antitrust laws, then it must be the case that the antitrust laws impose the same or "similar" duties as the Telecommunications Act (DOJ Br. 1), or that the Second Circuit "imported" Telecommunications Act duties and standards into the antitrust laws and "conflated" the two (*id.* at 6, 8, 24). This is the basis for DOJ's palpably erroneous assertion that the Second Circuit's holding means that any violation of the 1996 Act is *ipso facto* a violation of the antitrust laws. *Id.* at 7.

As the Second Circuit recognized, antitrust cases are decided by applying *antitrust* standards to challenged business conduct that occurs in particular market and regulatory contexts – in order to implement the antitrust objective of maximizing "'consumer welfare.'" *Reiter* v. *Sonotone Corp.*, 442 U.S. 330, 343 (1979). Regulation and regulatory duties have no effect on the antitrust *standards*. They can, however, profoundly affect the *judgments* that are reached under antitrust standards, for in applying the antitrust laws, the "impact of regulation must be assessed simply as another fact of market life," and "'the antitrust court must

consider the peculiarities of an industry as recognized in a regulatory statute.'" *Phonetele*, 664 F.2d at 742 (Kennedy, J.) (quoting 1 P. Areeda & D. Turner, *Antitrust Law* ¶ 223d (1978)).

Under § 2 of the Sherman Act, the antitrust offense of monopolization has two elements: (1) the possession of monopoly power in the relevant market and (2) the "willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historical accident." *United States* v. *Grinnell Corp.*, 384 U.S. 563, 570-71 (1966). Under these standards, many violations of the 1996 Act will not violate the antitrust laws. For example, if the threshold requirement of monopoly power is not met, no conduct that violates the 1996 Act would violate antitrust laws.

Here, monopoly power is adequately pled, and the issue is whether there are sufficient allegations of conduct that constitute the "willful acquisition or maintenance of that [monopoly] power." *Id.* This element has two sub-elements. Foremost, the challenged conduct must "reasonably appear capable of making a significant contribution to creating or maintaining monopoly power." 3A P. Areeda & H. Hovencamp, *Antitrust Law* ¶ 651f, at 83-84 (2d ed. 2002). Much conduct that violates the 1996 Act would not satisfy this standard. For example, failures to provide access to those unbundled network elements that are not also essential facilities may adversely affect some individual competitors, but may have no potential effect on many other entrants and thus have no capacity to create or maintain a monopoly. Compare *Verizon Communications, Inc.* v. *FCC*, 535 U.S. 467, 510 n.27 (2002). As DOJ notes, however, this standard is met by the Complaint's allegations that Verizon has denied reasonable access to an essential facility (the local loop) that is required to compete in the market and cannot be duplicated because of the facility's natural monopoly characteristics. DOJ Br. 22 n.6.

The final question, and the one most relevant here, is whether the conduct that maintains monopoly is "willful." Willful conduct is conduct that "'either does not further competition on the merits or does so in an unnecessarily restrictive way.'" *Aspen Skiing Co.* v. *Aspen Highlands Skiing Corp.*, 472 U.S. 585, 605 & n.32 (1985). The Court has defined "willful" conduct to mean conduct that is "predatory" or "exclusionary," *i.e.*, that excludes rivals on some basis other than efficiency, or that advances no "legitimate business purpose." *Id.* at 605. In this regard, the Court has approved jury instructions that simply state that refusals to deal are unlawful if they advance no "legitimate business reasons." *Id.* at 597. As Prof. Areeda stated, monopolization requires some element of impropriety; it requires "monopoly power coupled with some impropriety in its achievement."[14]

At the same time, in determining if the conduct is "willful," courts seek to assure that "procompetitive behavior" or other desirable behavior is not chilled. *Eastman Kodak Co.* v. *Image Technical Servs. Inc.*, 504 U.S. 451, 479 (1992); *Town of Concord, Mass.* v. *Boston Edison Co.*, 915 F.2d 17, 21 (1st Cir. 1990) (courts "compare the challenged practice's likely anticompetitive effect with its potentially legitimate business justifications") (Breyer, J.). These determinations are made in the particular regulatory context in which the defendant acts. *Id.*

The application of these criteria here is straightforward. Verizon is alleged to have denied access to a natural monopoly facility (the local loop) that is essential to allowing competition in switching or other "unshared" portions of the exchange. This is a context in which, in Judge Posner's words, "cooperation is indispensable to effective competition," *Olympia Equip. Leasing Co.* v. *Western Union*

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[14] P. Areeda, *Essential Facilities: An Epithet in Need of Limiting Principles*, 58 Antitrust L.J. 841, 846 (1990) ("Areeda").

Tel. Co., 797 F.2d 370, 379 (7th Cir. 1986), and in which sharing would "substantially . . . improve competition in the marketplace." 3A *Antitrust Law* ¶ 773 at 197.

Further, there is a clear "element of impropriety" here, for Verizon is alleged to have violated access regulations that are "extrinsic" to the antitrust law.[15] Contrary to DOJ's belief (Br. 24), when an antitrust court relies on duties "extrinsic" to the antitrust laws in making determinations that a monopoly has been "willfully" acquired or maintained, it is not "import[ing]" standards from other laws into the antitrust laws. Rather, the extrinsic duties are "fact[s] of market life" that aid the *antitrust* determination whether the conduct that maintained the monopoly is ordinary profit maximizing behavior that the law should not inhibit (building a better mousetrap) or conduct that serves no legitimate business purpose and excludes rivals for reasons having nothing to do with efficiency. It is precisely because the antitrust laws are not a "license for courts to create codes of desirable business behavior" (DOJ Br. 9) that these determinations must rely on the independent body of common law, statutes, and regulatory rules that define and channel legitimate business behavior and competition on the merits in that market. Otherwise, it would be open to competitors to argue that it is legitimate for them to maintain monopolies through such "profit maximizing" conduct as enforcing fraudulently obtained patents (*Walker Process Equip., Inc.* v. *Food Mach. & Chem. Corp.*, 382 U.S. 172 (1966)), engaging in sham litigation that is a tortious abuse of process (*California Motor Transp. Co.* v. *Trucking Unlimited*, 404 U.S. 508 (1972)), or even dynamiting competitors' plants.

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[15] As DOJ concedes (Br. 12 n.3), it is well-settled that "where conduct contributes to establishing or maintaining monopoly power, a court will be especially likely to find that conduct predatory or anticompetitive if it is also improper for reasons extrinsic to the antitrust laws." ABA, *Antitrust Law Developments* 249 (5th ed. 2002).

These principles have special force here. The antitrust laws are a "consumer welfare prescription" and are to be implemented in the ways that will maximize "consumer welfare." *Reiter*, 442 U.S. at 343. Here, the regulations that Verizon has violated rest on regulatory findings that local loops are natural monopolies and that making them available at TELRIC-based rates protects all legitimate interests of incumbents, is essential to allow competition in local exchange and exchange access services, and will produce lower prices for consumers in these downstream markets.

As the commentators on whom DOJ and Verizon rely note, this presents the "strongest" case for a finding of an unreasonable refusal to deal. 3A *Antitrust Law* ¶ 773 at 197 ("argument for forcing access is therefore strongest in the case of a price-regulated monopolist whose denial of access aids it in evading rate regulation or undermines the regulator's plan to encourage rivalry either in the primary or adjacent market"); Bork Op. 4-6 & *supra* at 11 n.9; see *Town of Concord*, 915 F.2d at 29 ("[a] special [antitrust] problem is posed by a monopolist, regulated at only one level, who seeks to dominate a second, unregulated level, in order to earn at that second level the very profits that regulation forbids at the first").

The existence of regulatory requirements also eliminates any basis for concern that antitrust liability would chill procompetitive behavior. In this regard, DOJ and Verizon cite three reasons why refusals to share facilities should seldom violate the antitrust laws: reduced incentives to invest in alternative facilities, risks of collusion, and administrative difficulties for courts and juries in determining the terms and fair price for sharing. 3A *Antitrust Law* ¶ 771b at 171-72. As the commentators on whom DOJ and Verizon rely again note, none of these considerations applies when there is an independent regulatory requirement that a natural monopoly facility be shared at a regulated non-monopoly price. *Id.* ¶ 726e at 217-18; see also *supra* at 11-12 & nn.9-12 (views of

Judge Bork and Profs. Areeda and Sullivan). The "extrinsic" regulatory duty imposed by the 1996 Act independently creates the same risks of collusion or reduced investment, and because the unreasonable refusal to deal is a bad faith violation of the regulation's terms (determined by existing state and federal regulators), there are no administrative burdens on courts. See Areeda, *supra* at 19 n.14, at 853 (antitrust remedies appropriate when "a regulatory agency already exists to control the terms of dealing").

In this context, the only argument against antitrust liability is that a regulatory agency is theoretically available and in a better position to determine the scope and terms of any duty to deal. 3A *Antitrust Law* ¶ 773 at 197. That argument has no force when the conduct has been found to violate the access regulation. Further, even in other contexts, if there were any concern about inhibiting conduct that might satisfy regulators, antitrust liability could be limited here – as it was in prior antitrust cases against the Bell System – to conduct that the defendant did not reasonably believe in good faith to satisfy regulatory standards. See *supra* at 9.

II. THE 1996 ACT'S ANTITRUST SAVINGS CLAUSE DEFEATS DOJ'S AND VERIZON'S CLAIMS.

Against this background, Verizon's and DOJ's claims based on the savings clause are spurious. DOJ acknowledges that violations of duties "extrinsic" to the antitrust laws are relevant to determining if a monopoly has been acquired or maintained through illegitimate means, but it contends that the savings clause means that the antitrust laws cannot "outlaw conduct that, but for the 1996 Act, would not violate the antitrust laws." DOJ Br. 11, 14 n.5, 18, 24-25 & n.10.

DOJ has matters backwards, for three reasons.

First, the language and history of the savings clause foreclose these claims. Even if consideration of the duties imposed by the 1996 Act would expand the "standards" and "scope of the antitrust laws" (DOJ Br. 11, 24) – which it

would not – the savings clause does not say that the Act is to have no effect on the scope of antitrust laws. Rather, it says that "nothing in this Act . . . shall be construed to modify, impair, or supersede the *applicability* of any of the antitrust laws." 47 U.S.C. § 152 note. As the legislative history makes explicit, this clause is designed to prevent claims that antitrust law is inapplicable to conduct regulated by the 1996 Act,[16] and Congress adopted this clause because it understood – based on the experience of introducing competition into long distance and equipment markets – that antitrust enforcement is an essential supplement to efforts to open telecommunications markets to competition through access regulations.

Second, DOJ's and Verizon's claim would be wrong even if the savings clause stated that the Act shall not be construed to affect the "scope" or "standards" of the antitrust laws. As explained above, *supra* at 17-18, antitrust standards require that monopolization determinations be made on the basis of the regulatory duties and other "facts of market life" in an industry, and when courts do so, they are not "importing" standards from other statutes into the antitrust laws or expanding the scope of the antitrust laws. They are applying the established preexisting antitrust standards in accord with their terms and purposes. In this regard, it would be a

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[16] *See, e.g.*, H.R. Conf. Rep. No. 104-458, at 201 (1996) (savings clause "prevents affected parties from asserting that the bill impliedly preempts other laws"); S. Rep. No. 104-230, at 201 (1996) (same); S. Rep. No. 104-23, at 17 (1995) ("the provisions of this bill shall not be construed to grant immunity from any future action against any entity referred to in the bill"); 142 Cong. Rec. H1,145 (Feb. 1, 1996) (Rep. Conyers) ("by maintaining the role of the antitrust laws, the bill helps to ensure that the Bells cannot use their market power to impede competition and harm consumers"); President's Statement Upon Signing the 1996 Act, *reprinted in* 1996 U.S.C.C.A.N. 228-1, 228-3 (Feb. 12, 1996) (savings clause "ensures that even for activities allowed under or required by the legislation, or activities resulting from FCC rulemakings or orders, the antitrust laws continue to apply fully").

practical impossibility and violation of antitrust standards for a court to attempt to decide a monopolization claim as if the 1996 Act did not exist. As was stated by then-Judge Kennedy, "'the antitrust court must consider the peculiarities of an industry as recognized in a regulatory statute.'" *Phonetele*, 664 F.2d at 742-43 (quoting 1 P. Areeda & D. Turner, *Antitrust Law* ¶ 223d (1978)); see *id.* ("[t]he impact of regulation on pricing and other competitive factors is too obvious to be ignored"). Here, as explained above, *supra* at 20-21, these effects of regulation mean that denials of access to local areas unequivocally prevent competition on the merits and that the imposition of antitrust liability could not chill procompetitive conduct, lead to collusion, or present administrative problems.

Third, DOJ and Verizon are proposing a construction of the savings clause in which it would create the very antitrust immunity that it was the object of the savings clause to prevent. The savings clause provides that "nothing" in the Act (including, therefore, the savings clause) shall be construed to limit the applicability of the antitrust laws. But DOJ and Verizon are proposing a construction of the savings clause which bars antitrust liabilities that would be imposed if there were no savings clause. A statute may not be construed to "'destroy itself.'" *AT&T Co.* v. *Central Office Tel., Inc.*, 524 U.S. 214, 228 (1998) (citation omitted).

III. THE "UNADORNED" ANTITRUST LAWS DO NOT LEGITIMIZE ALL REFUSALS TO DEAL THAT MAXIMIZE SHORT-RUN PROFITS.

Finally, DOJ's and Verizon's claims also rest on misstatements of the meaning of the "unadorned" antitrust standards that purportedly would apply if the duties imposed by the 1996 Act could be ignored. In particular, they contend that claims of refusals to deal (like predatory pricing claims) are or should be exceptions to the standards that generally govern determinations of whether monopolies have been acquired or maintained through illegitimate means. In

particular, in their view, refusals to deal are *per se* lawful unless they sacrifice short-run profits. DOJ Br. 15-20; Verizon Br. 17-23. DOJ and Verizon further contend that there is no reason to inquire into whether such "'sacrifice'" has occurred unless the incumbent has "voluntarily" provided non-rivals the same thing that it denies rivals on the same terms and conditions. DOJ Br. 14-15, 23-25 nn.8-11; Verizon Br. 19-20.

These claims are quite clearly wrong. Although sacrifices of short-run profits (and discrimination against rivals) certainly represent conditions in which refusals to deal can be found exclusionary and predatory, this Court has never held that these are the *only* conditions in which refusals to deal can be condemned under the antitrust laws. And there is no basis for such a categorical rule in economic or antitrust policy. Moreover, the distinctions that DOJ and Verizon would draw are – as the facts of this case illustrate – wholly irrational and would produce arbitrary distinctions among conduct having identical purposes and effects.

1. The Court's decisions squarely reject the rule that DOJ proposes. In *Otter Tail Power Co.* v. *United States*, 410 U.S. 366 (1973), the Court invalidated a refusal to deal that maximized the defendant's profits in the short term as well as the long term, and the utility unsuccessfully defended its conduct on that basis. Specifically, the Court upheld the district court's finding that Otter Tail had violated § 2 when it violated regulatory requirements that obligated it to "wheel" (at wholesale) power for municipalities that were attempting to compete with Otter Tail in retail markets. In so holding, the Court necessarily rejected the notion that exclusionary conduct can only be found if there has been "sacrifice." Under DOJ's theory, the Court would have been required to reverse the district court on the grounds that Otter Tail clearly had a "business justification" for its refusal to deal – preservation of retail monopoly profits.

In *Aspen Skiing*, the Court likewise did not apply a "sacrifice of short term" profits test, but instead asked whether Ski Co.'s conduct had "'unnecessarily'" impaired competition. *Aspen Skiing*, 472 U.S. at 605 n.32. Contrary to Verizon's (Br. 18) and DOJ's (Br. 19) assertions, Ski Co.'s antitrust violation was its refusal to market the 4-area, 6-day *discounted* ticket (with revenues divided by usage) which skiers preferred. The antitrust violation was not Ski Co.'s refusal to sell tickets to Highlands at full retail price, which was merely evidence of Ski Co.'s intent in eliminating the discounted 4-area tickets. 472 U.S. at 608. In this regard, the evidence was that Ski Co.'s share of industry revenues increased each ski season after it discontinued the 4-area ticket. *Id.* at 594-95; see 3A *Antitrust Law* ¶ 772 at 185 n.35 (Ski Co.'s "business calculation was doubtless that its short-run revenues during the current season would be higher with a three-area ticket than with a four-area ticket"). Critical to the finding of antitrust liability was that the "optimal" method of distribution was the 4-area ticket (472 U.S. at 604 n.31 & 605-7) and that, in Judge Posner's words, this is a market in which "cooperation is indispensable to effective competition." *Olympia*, 797 F.2d at 379.

2. Nor is there any economic basis for adoption of a sacrifice test in this context. As advanced by DOJ, the purpose of the sacrifice test is to shield from antitrust scrutiny conduct that is profit maximizing (apart from lessening competition) because such business conduct is ordinarily in the public interest. DOJ Br. 17. The sacrifice test arose in predatory pricing cases, where it has been recognized that price reductions are presumptively beneficial to consumers in all markets and that there is a substantial risk that misapplication of the antitrust laws could deter procompetitive behavior. See, *e.g.*, *Brooke Group Ltd.* v. *Brown & Williamson Tobacco Corp.*, 509 U.S. 209 (1993).

Refusals to deal, on the other hand, present a vast array of widely varying conditions, and there is no reason or basis to

impose *per se* rules of legality – or even presumptions of legality – based upon the presence or absence of short-term sacrifice. This is particularly true where, as here, the refusal to deal is by an incumbent monopolist that controls natural monopoly facilities that cannot be replicated by new entrants, a context in which the incumbent may be able to charge supracompetitive rates *without* attracting entry. See, *e.g.*, William J. Baumol et al., *Contestable Markets and Industry Structure* 290-303 (1982).

And when, as here, the conduct occurs in a context in which laws extrinsic to the antitrust laws require dealing at non-monopoly rates in order to open markets to competition and reduce prices to consumers, there is no possible basis for an irrebuttable presumption that a refusal to deal is lawful whenever short-term profits are maximized. See Areeda, *supra* at 19 n.14, at 848 n.34 ("a duty to deal" will here "benefit customers"). To the contrary, as the nation's leading antitrust scholars have found, the fact that the incumbent has incentives to violate such regulation in order to maximize short-term (and long-term) profits presumptively establishes the illegitimacy of its conduct under the antitrust laws, *not* its lawfulness. See Areeda Op. 3; Bork Op. 4-6; Sullivan Op. 11-13; *supra* at 12 n.11.

3. Finally, DOJ's and Verizon's distinction between "affirmative" and "negative" duties would produce results that are irrational and that advance no plausible economic or antitrust theory. Specifically, DOJ and Verizon maintain that violations of "affirmative" duties to share essential facilities are lawful unless they reflect a short-run profit sacrifice. DOJ Br. 19-20; Verizon Br. 22. By contrast, they claim violations of "negative" duties are assessed under the normal § 2 standard in which conduct that maintains a monopoly is unlawful if it "'either does not further competition on the merits or does so in an *unnecessarily* restrictive way'" and in which the question is whether the "harm to competition" is "disproportionate to consumer benefits" and "to the economic

benefits to the defendants (aside from benefits that accrue from diminished competition)." DOJ Br. 14.

Preliminarily, this approach would present immense practical problems. Here, because of their incentives to do whatever possible to delay and frustrate the access required by the 1996 Act, ILECs have engaged in courses of conduct that include violations of "negative" duties (sham litigation, intentional misrepresentations, and acts of sabotage), violations of affirmative duties (outright denials of access), and conduct that cannot be readily characterized as one or the other (bad faith conduct in negotiation or implementation of interconnection agreement).

Even assuming that antitrust courts could, in practice, readily distinguish "negative" duties from "affirmative" ones, DOJ's proposed rule would immunize from antitrust liability conduct that is economically indistinguishable from conduct that would create liability. DOJ acknowledges that an ILEC would be guilty of monopolization if it delayed the provision of access to essential facilities by violating negative duties: *e.g.*, by engaging in sham litigation and making bad faith claims to a state commission that the provision of access to the particular facility is not technically feasible. DOJ Br. 14 n.4 (citing *Trucking Unlimited*, 404 U.S. 508); compare *Litton*, 700 F.2d 785 (2d Cir. 1983) (advocacy of PCA requirement was sham litigation). Under DOJ's approach, this conduct would be unlawful even though it maximized the incumbent's short-run profits (by preventing competitors from supplanting high margin retail services), because the conduct violates "negative" duties extrinsic to the antitrust laws (abuse of process) and any benefits are disproportionate to competitive harm.

But an entirely different standard – absolute immunity – would apply if the incumbent engaged in what can be characterized as a refusal to deal and violation of an "affirmative" duty. For example, suppose an incumbent unilaterally refused to provide access to the facility in

violation of an explicit FCC order that it do so. Compare *MCI*, 708 F.2d 1081 (7th Cir. 1983) (access denied in violation of prior FCC order). In this context, DOJ would treat the fact that the conduct maximized profits as irrefutably establishing that the conduct has a legitimate business purpose and cannot constitute monopolization. Thus, DOJ would treat differently conduct that is identical in effect and purpose based on an (arbitrary) determination whether the conduct is considered a violation of a "negative" or an "affirmative" duty.

DOJ's test would produce remarkably irrational results, for the *greater* the consumer benefit that would result from sharing, the *lesser* the likelihood that the access denials would be found unlawful. Here, of course, FCC regulations seek to promote local competition by requiring incumbents to grant competitors access at cost-based rates to monopoly facilities. Those access regulations deny the incumbents profits they might have earned by using the same facilities to provide their own retail services. The calculus under the sacrifice test therefore would turn on whether the net benefit from denying the access (retail revenues preserved minus fines imposed for access violations) would exceed the revenues from access and interconnection (the cost-based rates paid by the CLEC). Perversely, the greater the investment that the CLEC had made in alternatives to incumbent facilities (and thus the lesser the leasing revenues the incumbent would forego by denying access), the clearer it would be that the short-term sacrifice test would be met.

For example, if a CLEC had built an entire alternative network (loops, switches, and transport), the CLEC would provide the maximum possible investment in "unshared facilities" and, in Verizon's and DOJ's view, the maximum competitive benefit. See *AT&T Corp.* v. *Iowa Utils. Bd.*, 525 U.S. 366, 413-44 (1999) (Breyer, J., concurring). But in that event, the CLEC would lease no network elements and the incumbent would forego only incidental revenues (from

"trunks" to interconnect the two networks) in denying access. Thus, there would almost certainly be a net gain in short-run profits from denying the rival's interconnection request.

In contrast, the likelihood that the revenues from access (less fines) would offset the incumbent's retail revenues would be much greater if the CLEC leased loops, much greater still if it leased combinations of loops, switching, and transport at TELRIC rates, and at its greatest when the CLEC buys wholesale services for resale under § 251(c)(4) (under a pricing standard that preserves the incumbent's net revenues). This is precisely the opposite of what any rational application of antitrust principles should produce.

This underscores that DOJ has been seduced by abstract labels and has urged a position that makes no economic or legal sense. Where an incumbent acquires or maintains its monopolies by willfully violating regulations designed to make competition possible and to allow consumers to receive lower priced services, that conduct, whether it reflects sacrifice or not, epitomizes conditions in which the incumbent has excluded rivals for reasons having nothing to do with efficiency and in which the incumbent's conduct is "exclusionary," "predatory," and justified by no legitimate business purpose.

CONCLUSION

If the case is not dismissed for lack of standing or as improvidently granted, the judgment of the Second Circuit should be affirmed.

Respectfully submitted,

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